SUPREME COURT OF THE STATE OF NEWYORK
APPELLATE DIVISION: SECOND DEPARTMENT

In The Matter of the Proceeding of The People of The State of New York *ex rel*, ANDREW KRIVAK, Petitioner, For a Writ of Habeas Corpus Under Article 70 of the Civil Practice Law and Rules -against- ROBERT L. LANGLEY, JR. Sheriff of Putnam County, New York, Respondent.	:	Appellate Division Number _____

PETITIONER'S VERIFIED
HABEAS CORPUS PETITION
AND ATTORNEY AFFIDAVIT

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VERIFIED **HABEAS CORPUS** PETITION

SUPREME COURT OF THE STATE OF NEWYORK
APPELLATE DIVISION: SECOND DEPARTMENT

In The Matter of the Proceeding of	:	
The People of The State of New York *ex rel*, ANDREW KRIVAK,	:	**VERIFIED PETITION FOR WRIT OF HABEAS CORPUS**
Petitioner,	:	
For a Writ of Habeas Corpus Under Article 70 of the Civil Practice Law and Rules	:	Appellate Division Number _____
-against-	:	
ROBERT L. LANGLEY, JR. Sheriff of Putnam County, New York,	:	
Respondent.	:	

OSCAR MICHELEN, a duly licensed attorney, admitted to practice under the laws of the State of New York, appearing on behalf of ANDREW KRIVAK, hereby affirms under the penalty of perjury that the following is true:

1. I am the attorney for petitioner ANDREW KRIVAK ("Krivak" or "Petitioner") and submit this affirmation in support of a special proceeding pursuant to Article 70 of the Civil Practice Law and Rules, for a writ of habeas corpus releasing Krivak on his own recognizance, or on a reasonable bail.

2. The information contained in this affidavit is based on information and belief, court records, available documentation, conversations with Petitioner,

his family members, friends, and co-counsel.

Petitioner is Entitled to Habeas Corpus Relief

3. This Court has every reason to believe that Andrew Krivak will return to court when required. For twenty-two years, Mr. Krivak has maintained his innocence of the heinous crime for which he was convicted in 1997 and has consistently fought to clear his name through the judicial system. Indeed, Mr. Krivak is so intent on clearing his name that he refused the prosecution's recent plea offer under which Mr. Krivak would plead guilty to manslaughter in exchange for a sentence of 7-21 years, which his time served would count against (and exceed the maximum). Instead, he chose to proceed to the 440 hearing ordered by this Court, which resulted in the grant of a new trial on May 9, 2019. Mr. Krivak's refusal of the plea offer is essential to the question of whether Mr. Krivak will return to court as required: Only a person intent on vindication through the judicial process would decline a plea offer that would have immediately set him free. Additionally, that Mr. Krivak will return to court as required is supported by the likelihood that he will prevail at trial, as his co-defendant Anthony DiPippo did in 2016. Indeed, in granting Mr. Krivak's 440 petition, the Court necessarily found that a jury hearing all of the evidence today would probably reach a more favorable result, i.e., an acquittal. That finding was based on the emergence, since Messrs. Krivak and DiPippo's convictions, of new evidence that the rape and murder of the

twelve year old victim in this case was actually perpetrated by a notorious, serial, child-rapist by the name of Howard Gombert who had been operating in and around the Town of Carmel at the time the victim in this case disappeared. At his 440 hearing, Petitioner presented evidence that Gombert had confessed to the crime to Joseph Santoro, who had been incarcerated with Gombert in Connecticut. At the DiPippo re-trial, in addition to Mr. Santoro's testimony, evidence was presented connecting Gombert to the victim and other evidence of similar acts of sexual abuse committed by Gombert. See, Bail Decision at page 3. In addition to very strong third party guilt evidence, new evidence undermining the state's witnesses and theory of the case has emerged together with evidence demonstrating a pattern of coercion by the investigating officers in this case of witnesses designed to manufacture evidence against Mr. Krivak and Mr. DiPippo. Finally, in the years since Mr. Krivak was convicted, two of the three central investigating officers in this case have been compromised: one has been convicted of a crime relating to his false denials that he beat an individual in his custody and the other has been shown to have participated in eliciting a false confession from a teenager under circumstances very similar to those in this case.

4. Petitioner is unlawfully detained by Respondent Putnam County Sheriff at the Putnam County Jail. Petitioner has been confined since May 9, 2019 because of the unconstitutional denial of bail in this case. See C.P.L. § 510.10.

5. Petitioner is not detained by virtue of any judgment, decree, final order or process of mandate issued by the Court or Judge of the United States in a case where such Court or Judge had exclusive jurisdiction under the laws of the United States or has acquired exclusive jurisdiction by the commencement of legal proceedings in such Court, nor has Petitioner been committed or detained by virtue of the final judgment or decree of a competent tribunal of Civil or Criminal jurisdiction or the final order of such tribunal made in a special proceeding instituted for any cause or by virtue of any execution or process issued upon such judgment, decree or final order.

6. No Court or Judge of the United States has exclusive jurisdiction to order Petitioner's release.

7. A Writ of Habeas Corpus from this Court is the only effective means whereby Petitioner may obtain relief from his illegal detention and gain his release.

8. No appeal has been taken from any order of commitment.

9. The Appellate Division has jurisdiction over habeas corpus proceedings. C.P.L.R. § 7002(b) ("a petition for the writ shall be made to . . . the appellate division in the department in which the person is detained").

10. The Appellate Division in this habeas corpus proceeding may review for abuse of discretion the Trial Court's unconstitutional denial of bail and modify the Bail Order or release Petitioner on his own recognizance. See C.P.L.R. §§ 7010(a) ("Discharge. If the person is illegally detained a final judgment shall be directed discharging him forthwith"); 7010(b) ("Bail. [] If the person detained has been

denied bail, and he is not ordered discharged, the court shall direct a final judgment admitting him to bail forthwith, if he is entitled to be admitted to bail as a matter of right, or if it appears that the denial of bail constituted an abuse of discretion.").

11. A copy of the bail decision, dated June 14, 2019, is attached as Exhibit "A."

12. As discussed below, the Trial Court abused its discretion by (a) improperly considering and giving great weight the fact that Mr. Krivak had previously been convicted of the crime at issue in this case when his conviction for that crime had been reversed; (b) improperly characterizing Mr. Krivak's prior criminal history; and (c) failing to adequately consider the statutory factors it was required to consider under C.P.L. § 510.30 to determine whether Petitioner will return to court.

13. Petitioner therefore respectfully requests that this Court exercise its authority to vacate the Bail Order and release Petitioner on his own recognizance, or, in the alternative, modify bail to two or more of the following amounts and forms, which Petitioner and his family would be able to afford:

(a) A Personal Recognizance Bond for $300,000.00 secured by three guarantors;

(b) A secured Bail Bond, issued by a duly licensed New York State Bail Bond Agency in the amount of $250,000.00

PROCEDURAL HISTORY

14. On June 11, 1997, Petitioner was convicted, after a jury trial, in the Supreme Court, Putnam County of murder in the second degree and rape in the first degree and he was sentenced to 25 years to life in prison. He has served 22 of those years to this point.

15. The Appellate Division affirmed his conviction on October 4, 1999, *People v. Krivak*, 265 A.D.2d 343 (2d Dep't 1999).

16. Krivak's co-defendant DiPippo had first moved to vacate his conviction based on ineffective assistance of counsel. The trial court denied the motion but was reversed by the Second Department which ordered a new trial. *People v. DiPippo*, 82 AD3d 786. At that re-trial, however, the trial court would not allow evidence of third party culpability and Mr. DiPippo was again convicted and on his direct appeal, the Second Department affirmed. *People v. DiPippo*, 117 AD3d 1076 (2d Dep't 2014). The Court of Appeals reversed the Second Department, however, holding that Mr. DiPippo should have been allowed to present evidence of third party culpability. *People v. DiPippo*, 27 NY3d 127 (2016). The Court of Appeals ordered a new trial.

17. At his third trial, DiPippo presented substantial evidence pointing to Howard Gombert as the real perpetrator and was acquitted.

18. Before the third DiPippo trial, Petitioner also moved to vacate his conviction and also moved for a new trial. The trial court denied the motion and was reversed by the Second Department which ordered a new trial. *People v. Krivak*, 168 AD3d 979 (2d Dep't 2019).

19. Based upon the Appellate Division's decision, this matter proceeded to a hearing before the Hon. David Zuckerman on May 9, 2019. At the close of the hearing, at which the testimony of Joseph Santoro was presented, the court, in an oral decision, vacated the Petitioner's convictions and ordered a new trial. On the same day, the court denied Petitioner's oral application for bail pending re-trial.

20. The People have appealed the trial court's decision vacating Petitioner's conviction. That appeal has yet to be perfected.

21. Upon notice that the People planned to appeal Mr. Krivak's conviction – a development that will significantly delay Mr. Krivak's new trial – Mr. Krivak's counsel sought reconsideration of the Court's denial of bail. A copy of the motion is attached as Exhibit "B."

22. The People's opposition to that motion is attached as Exhibit "C" and Petitioner's reply to that opposition is attached as Exhibit "D." The People then sent an email, dated June 6, 2019, which the trial court labeled a sur-reply. The email is attached as Exhibit "E." A copy of the relevant sections of the 440 hearing comprising the denial of the oral bail application is attached as Exhibit "F."

ARGUMENT

The Applicable Legal Standard

23. C.P.L.R. § 7010 (b) provides that a court may issue a writ of habeas corpus "[i]f the person detained has been denied bail, and … it appears that the denial of bail constituted an abuse of discretion."

24. The actions of a bail-fixing court "may be reviewed in a habeas corpus proceeding if it appears that the constitutional or statutory standards inhibiting … the arbitrary refusal of bail are violated." *People ex rel. Kuby ex rel. Jordan v. Merritt*, 96 A.D.3d 607, 608 (1st Dep't 2012).

POINT I

THE TRIAL COURT ERRED IN RELYING HEAVILY ON PETITIONER'S PRIOR CONVICTIONS FOR THESE CRIMES

25. While the court's decision denying bail sets forth a number of factors for its denial, it focused heavily on the Petitioner's prior conviction for these crimes. It acknowledged that it remanded Petitioner upon the oral application "essentially maintaining his bail status as a sentenced prisoner." Ex. A at page 4.

26. In its analysis of the factors a court should consider in determining bail, the court begins by stating the "Defendant has already been found guilty." Ex. at page 9.

27. Even in conducting its analysis of the factors set forth in CPL 510.30, the court below returned to the Petitioner's convictions, stating "This court is also

mindful that Defendant has already been tried and convicted of these same charges." Ex. A at page 12.

28. In support of its reliance on the previous convictions, the trial court cited *People ex. rel Calloway v. Skinner*, 33 NY2d 23 (1973) (see Ex. A at page 9). *Skinner*, however, dealt with whether a parolee has a due process right to the assistance of counsel at a preliminary parole revocation hearing and to whether a due process right to bail exists for a parolee detained in advance of a revocation hearing. That is a very different circumstance from the Petitioner's case. *Id.* Here, the vacatur of Petitioner's convictions restores him to his pre-trial status, and restores the presumption of innocence. "The policy of our law favors bail because of the presumption that the prisoner is innocent." *People ex rel. Lobell v. McDonnell*, 296 N.Y. 109, 111 (1947); *People v. Mohammed*,171 Misc.2d at 134 ("[P]ublic policy favors release pending a determination of guilt or innocence.")

29. Rather, the court used the vacated convictions as presumption of (or at least evidence of) Petitioner's guilt.

30. The court also largely ignored the acquittal of Petitioner's co-defendant Anthony DiPippo in determining the likelihood of Petitioner's conviction upon re-trial. While Petitioner has the additional evidence of a purported inculpatory statement, that statement's veracity was also seriously called into question by DiPippo's acquittal since Petitioner's statement implicated DiPippo in the crime. Presumably, the People's witnesses presented at DiPippo's trial will be the same as

those presented at Petitioner's re-trial and the myriad issues with the People's case will also be the same.

31. In asserting the strength of the People's case in his sur-reply, ADA Larry Glasser sets forth names of witnesses who claimed to have seen the Petitioner and his co-defendant with the victim while leaving out that all but one have since recanted; one of those witnesses, Adam Wilson, even testified for the defense at DiPippo's re-trial.

32. There is also significant evidence pointing to a culpable third party – Howard Gombert. Clearly the trial judge found Mr. Santoro's testimony to be credible otherwise he would have rejected it. In fact, Mr. Santoro's testimony was so strong that it was all the trial court wanted to hear, recognizing the powerful nature of the testimony and the effect it would have on any jury hearing the case.

33. In light of that, for the court to rely on the Petitioner's convictions which it just vacated is an abuse of discretion.

POINT II

THE COURT ABUSED ITS DISCRETION IN DETERMINING THAT THE OTHER CPL 510.30 FACTORS REQUIRED DENIAL OF BAIL

34. The court below in its decision went through the relevant factors as listed under CPL 510.30. Petitioner will discuss each of them in the order addressed by the court.

A. Character, Reputation Habits and Mental Condition

35. The court noted that the defendant had "seven adult felony arrests by the time he was eighteen." Ex. A at page 9. The court however incorrectly states that the Petitioner had two felony convictions (counting this matter). As the opposition affirmation of ADA Glasser acknowledges, the Petitioner had:

(a) One Juvenile Delinquent finding from when he was 14;

(b) A felony marijuana charge which was satisfied by a Youthful Offender (YO) adjudication

(c) A felony LSD possession case which was also satisfied with a YO adjudication;

(d) A felony PCP charge that also resulted in a YO adjudication;

(e) All other of his arrests were dismissed.

Therefore his conviction (now vacated) in this matter was his first actual felony conviction. Certainly, the Petitioner has a record of contacts with the criminal justice system, but they all stem from his youth and all of the convictions stem from drug related matters.

36. In the same section, the court noted that the Petitioner had numerous infractions from the Department of Corrections during his 20 year+ period of incarceration. The vast majority of those are again due to Petitioner smoking marijuana in the prison. That is a Tier III offense. Only one, the most recent, involved Petitioner having a weapon, a prison shiv. As the document attached to

ADA Glasser's opposition shows, the weapon involved has a small dull blade of less than two inches in length. The item was recovered from Petitioner at the Center Frisk Area. Petitioner will attest that he had been physically threatened by a fellow inmate and had therefore created and then brought that item on his person in the Center Frisk Area precisely for it to be located by guards upon his being searched so he could be removed from General Population prior to his transfer to Putnam County Correctional Center.

37. Both the ADA and the court made a point of noting that one of the petitioner's arrests was for Bail Jumping for failing to appear on one court date on his marijuana charge. This one, missed court date is hardly a record of disobedience of court dates or directives. Considering his age and his drug use at the time, one missed court date is not enough to deem Petitioner a flight risk. Additionally, the bail jumping arrest was dismissed.

B. Employment and Financial Resources

38. The court looked at Petitioner's statement to Probation from 1993 (referenced only by ADA Glasser's opposition at page 8) that he left a job when there were some irregularities in his timesheets. What those irregularities were was never addressed, but Petitioner was sixteen at that time. The court did not mention that ADA Glasser in the same paragraph also acknowledged that Petitioner had a history of working with his family, including his father who is a licensed plumber.

39. Petitioner also, since his incarceration, has completed a number of trade-related certifications including Food Service, Fabricator, and Welder. He completed his GED as well.

40. It is therefore likely that he will be able to find employment upon his release.

C. Family Ties and Length of Residence in the Community

41. ADA Glasser did a very good job nit-picking with the court that the Petitioner did not "live in Putnam County" his whole life, but rather spent a great deal of time in neighboring Dutchess County.

42. The court chose to ignore, however, Petitioner's two sisters who live in Carmel and who own their homes there. Petitioner will reside with one of his two sisters if released and will abide by travel restrictions that will not allow him to leave Putnam County without leave of court. While he does not have a current passport, he will agree not to apply for a passport.

43. His sisters have lived in the Carmel area their whole life and are willing to pledge a personal recognizance bond as collateral for Petitioner's return. The family and community supporters of Petitioner, including the Deskovic

Foundation[1], are also willing to put up real property in support of a secured bail bond should the court so choose.

D. Previous Record in Responding to Court Appearances When Required or Flight to Avoid Criminal Prosecution

44. Here, the court referenced that Petitioner absconded from a group home when he was 14 and that he twice gave a false name upon being arrested.

45. Once again, these indiscretions when Petitioner was a very young man, indeed when he was a troubled child do nothing to indicate that he is currently a flight risk.

E. Weight of the Evidence Against Him in the Pending Criminal Action

46. The court here held on to one line quoted by ADA Glasser from the decision vacating Anthony DiPippo's conviction. "As the People properly point out, however even the Court of Appeals, in remanding the matter for trial, noted the 'arguably overwhelming' evidence against DiPippo. Ex. A at page 12.

47. But the Court of Appeals also stated that the evidence of Gombert's culpability was "Compelling" and "highly probative" as to who committed the crime.

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1 The Deskovic Foundation is a New York based 501(c)(3) non-profit organization committed to exonerating the wrongfully convicted both in DNA and non-DNA cases, as well as wrongful conviction prevention. The Foundation was established as a result of Jeffrey Deskovic's own wrongful conviction at the age of 17 of the rape and murder of a 15 year old girl. After his exoneration and release after sixteen years in prison, Deskovic successfully sued the authorities responsible and used a substantial portion of the compensation he was awarded to start the Deskovic Foundation.

48. Furthermore, since the Court of Appeals decision, Mr. DiPippo has had his retrial. There was never a determination that the People's evidence presented at the re-trial was "overwhelming" - in fact it apparently was anything but: He was fully acquitted with the jury spending less than a full day in deliberation after a lengthy trial. See, Eberhart, Christopher, "Anthony DiPippo Found Not Guilty of Josette Wright's Murder in Putnam," www.lohud.com, Oct. 11, 2016 (available at the link below) (https://www.lohud.com/story/news/crime/2016/10/11/anthony-dipippo-verdict/91741150/ Yet the court treated the Court of Appeals' dictum of "arguably overwhelming" evidence from the original record – without the numerous recanted witnesses and newly discovered evidence – as the high court's evaluation of the evidence presented at the DiPippo re-trial.

49. In this section is where the court also referenced Petitioner's vacated conviction for the crime as proof of the strength of the case. Ex. A at page 12.

G. The Sentence Which May Be or Has Been Imposed Upon Conviction

50. The court claims it considered that Petitioner has already served "the lion's share" of the minimum of his 25 years to Life sentence but stated that it was not likely Petitioner would be paroled after 25 years. The court then again referenced the 1995 Bail Jumping arrest which never led to a conviction.

51. The court utterly failed to mention that the Petitioner has turned down a plea offer from the People that would have led to his release.

52. If the Petitioner was just looking to get out of jail, he could have accepted the recent plea offer and be home. Instead, because he wants to clear his name and finish the fight he stated over two decades ago, he rejected the offer.

Conclusion

53. Under New York law, the "only matter of legitimate concern," when setting bail is "whether any bail or the amount fixed [is] necessary to ensure the defendant's future appearances in court." *Matter of Sardino v. State Comm'n on Judicial Conduct*, 58 N.Y.2d 286, 289 (1983).

54. In remanding the Petitioner, the court below virtually adopted the entire opposition offered by the People without full consideration of the other myriad factors strongly in Petitioner's favor.

55. The court treated this bail application as if it was made at the time of the arrest and not in today's light. What do we know now that we did not know then?

56. The connection of this case to serial child rapist Howard Gombert; the strength of that evidence; the recantation of numerous witnesses who first testified against both defendants and some of whom have now testified in favor of Mr. DiPippo; the acquittal of Anthony DiPippo by a jury after the People had a full and fair opportunity to present all of their evidence; the stability of Petitioner's family where he will be welcome and where he will be within a stone's throw of the courthouse; the attention and press the case has garnered; and the fight, over a

period stretching across two decades, of these two men to clear their names from a heinous crime.

57. It flies in the face of reason, that after all of this, that Petitioner will choose to run away from court and not face his re-trial. A clear, objective reading of the record establishes that Andrew Krivak is not a flight risk. The court's determination that he is represents an abuse of discretion that must be overturned by this court.

58. Petitioner, having rejected a plea offer that would have guaranteed his release, is entitled to a reasonable bail which will allow him to be at liberty while he continues the fight to clear his name.

WHEREFORE, we respectfully request that a writ of habeas corpus issue releasing Petitioner on his own recognizance or a reasonable bail, along with such further relief as this Court deems proper.

DATED: Mineola, New York
July 12, 2019

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ATTORNEY VERIFICATION

OSCAR MICHELEN, a duly licensed attorney admitted to practice under the laws of the State of New York, hereby affirms under the penalty of perjury that the following is true:

I am the attorney for the petitioner in this habeas corpus proceeding pursuant to Article 70 of the Civil Practice Law and Rules and have read the foregoing petition. The same is true according to my knowledge, except as to matters stated therein to be made upon information and belief, which matters I believe to be true.

DATED: Mineola, New York
July 12, 2019

_____

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ATTORNEY'S AFFIDAVIT

SUPREME COURT OF THE STATE OF NEWYORK
APPELLATE DIVISION: SECOND DEPARTMENT

In The Matter of the Proceeding of The People of The State of New York *ex rel*, ANDREW KRIVAK, Petitioner, For a Writ of Habeas Corpus Under Article 70 of the Civil Practice Law and Rules -against- ROBERT L. LANGLEY, JR. Sheriff of Putnam County, New York, Respondent.	:	Appellate Division Number _____

OSCAR MICHELEN, a duly licensed attorney admitted to practice under the laws of the State of New York, hereby swears that the following is true:

1. I am the attorney for ANDREW KRIVAK, the petitioner in this habeas corpus proceeding, and submit this affidavit pursuant to C.P.L.R. § 7002 (c). I have been retained by the Petitioner to substitute in the place and stead of Adele Bernhard, Petitioner's previous attorney of record. Attached is a consent to change attorney form executed by the Petitioner. [2]

2. This habeas petition is being made on behalf of Petitioner, currently detained by Robert L. Langley, Jr., the Sherriff of Putnam County, at Putnam County Correctional Center, 3 County Center, Carmel, NY 10512. That detention is by virtue of a June 14, 2019, Decision and Order of the

2 It is not yet executed by Ms. Bernhard, who lost her father on July 4, 2019. She is however, aware of our substitution and cooperating with me on the transfer of Petitioner's file. She will sign the form upon her return to work.

County Court, Putnam County (Zuckerman, J.) denying Petitioner's motion for recognizance or bail and remanding him. A copy of that

Decision and Order is included as **Exhibit A** in the accompanying Petition.

3. The Decision and Order of June 14, 2019, is the cause of Petitioner's detention.

4. A court or judge of the United States does not have exclusive jurisdiction to order Petitioner released.

5. The Decision and Order denying bail, and Petitioner's detention, are illegal as the denial of bail was an abuse of discretion by the court below.

6. No appeal has been taken from the June 14, 2019, Decision and Order denying bail.

7. No previous application for habeas relief has been made and there are no new facts presented in the habeas petition.

DATED: Mineola, New York
July 12, 2019

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